Supreme Court, U.S.
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No.

IN THE
# Supreme Court of the United States

WAL-MART STORES, INC.,
*Petitioner,*

v.

SHIRLEY K. ROGERS,
*Respondent.*

**On Petition for a Writ of Certiorari To The United States Court of Appeals For The Sixth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Does Rule 41(d) of the Federal Rules of Civil Procedure authorize awards of attorney fees?

## PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption of the case. Wal-Mart Stores, Inc. does not have a parent company; nor does any publicly held company own 10% or more of Wal-Mart's stock. Wal-Mart currently owns more than 60% of Wal-Mart de Mexico, S.A. de C.V., a separately traded stock on BOLSA, the Mexican stock exchange. *See* Sup. Ct. R. 29.6.

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## OPINIONS BELOW

The opinion of the court of appeals (App. 2a-13a) is reported at 230 F.3d 868, and the district court's opinions (App. 15a-20a) are unreported.

## JURISDICTION

The court of appeals entered its judgment on October 26, 2000. App. 1a. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

## RULES INVOLVED

Rule 41(a)(2) of the Federal Rules of Civil Procedure provides in part:

> [A]n action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper.

Rule 41(d) of the Federal Rules of Civil Procedure provides:

> If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

## STATEMENT

On October 17, 1997, Shirley Rogers filed a complaint in Tennessee state court against Wal-Mart, seeking $950,000 in damages. The theory of the action was negligence, and the claim was that plaintiff tripped over a wooden pallet that a Wal-Mart employee had left in the aisle of one of the company's stores. Wal-Mart removed the case to the United States District Court for the Western District of Tennessee on diversity grounds.

On October 9, 1998, one year later and after plaintiff had missed the court's deadline for disclosing her expert witnesses, she received permission from the district court under Fed. R. Civ. P. 41(a) to dismiss the case without prejudice.

On February 4, 1999, another sixteen months later, plaintiff filed a new complaint in Tennessee state court. Stemming from the same occurrence, the second complaint again sought relief from Wal-Mart for negligence. Wal-Mart again removed the case to federal court, then filed a motion under Rule 41(d) for costs that it had incurred in the previously dismissed federal-court action.

On June 23, 1999, the district court granted Wal-Mart's Rule 41(d) motion. It thus ordered plaintiff to pay any court expenses and attorney fees that Wal-Mart had incurred in defending the original action that would not benefit the company in the second action. At the same time, the district court stayed the proceedings and gave plaintiff fourteen days to satisfy the terms of the order. On September 2, 1999, after plaintiff had failed to pay Wal-Mart's costs, the court dismissed the case without prejudice.

On appeal plaintiff challenged the district court's decision to include attorney fees in the Rule 41(d) order. In addressing the contention, the Sixth Circuit started by acknowledging the division of opinion among lower-court judges over the matter. "There is a split of authority," the court of appeals observed,

"as to whether Rule 41(d) authorizes attorney fees as part of an award of 'costs.'" App. 10a. *See also id.* ("The Sixth Circuit has recently recognized the split but declined to make a ruling: 'although . . . most courts have concluded that attorney fees may be awarded under Rule 41(d), the matter is far from settled in this circuit or in most others.'") (quoting *Duffy v. Ford Motors Co.*, 218 F.3d 623, 632 (6th Cir. 2000)).

While acknowledging "that the majority of courts find that attorney fees are available under Rule 41(d)," the Sixth Circuit ultimately decided to "hold that attorney fees are not available under Rule 41(d)." App. 10a. It did so for three reasons. One was the language of the Rule, which the court observed "does not explicitly provide for" fees but only generally mentions "costs." App. 10a. In the court's view, "[w]here Congress has intended to provide for an award of attorney fees, it has usually stated as much and not left the courts guessing." App. 10a. Second, it recognized "that an award of attorney fees may be authorized, even if not expressly provided for, 'if the statute otherwise evinces an intent to provide for such fees.'" App. 11a (quoting *Key Tronic Corp. v. United States*, 511 U.S. 809, 815 (1994)). But it found that "the structure of the Federal Rules of Civil Procedure is ambiguous at best on the question of attorney fees," in view of numerous other provisions that (unlike Rule 41) expressly refer to attorney fees. App. 11a-12a (citing Rules 30, 37 and 56, and 28 U.S.C. § 1920). In the absence of an "explicit[]" directive from Congress to provide for attorney fees in Rule 41(d), it did not find the "structure of the Civil Rules [] so unambiguous that can we divine a contrary intent on the part of Congress." App. 13a. Third, it found unpersuasive the reasoning of the "many courts" that have awarded attorney fees under Rule 41(d). These other courts, the Sixth Circuit believed, either rely too heavily on "the policy behind the rule" at the expense of its "plain language," or rely on the "parallelism" between Rule 41(d) and Rule 41(a)(2) which has been construed to authorize a court to condition voluntary dismissal without prejudice on payment of attorney

fees. Against this backdrop, the court felt that it would have "to essentially re-draft the rule" to provide for attorney fees not "explicitly" permitted by the rule. App. 12a-13a.

## REASONS FOR GRANTING THE WRIT

Each of the customary explanations for granting the writ applies here. This construction of Rule 41(d), as the Sixth Circuit itself recognized, implicates "a split of authority" in the lower courts and ultimately differs from what "the majority of courts" have done. App. 10a. The decision is wrong because it creates a clear-statement requirement for awarding attorney fees when no such requirement exists. *See Key Tronic Corp. v. United States*, 511 U.S. 809, 815 (1994). And the decision raises an important federal question, as illustrated by the large number of lower-court decisions construing the Rule, to say nothing of the legal commentators who have addressed the point. *See, e.g.*, Edward X. Clinton, Jr., *Does Rule 41(d) Authorize an Award of Attorney's Fees?*, 71 St. John's L. Rev. 81 (1997).

### I. A Mature Division of Authority Exists Over The Question Presented.

The Sixth Circuit was assuredly correct in at least one respect regarding this case. In recognizing that "[t]here is a split of authority as to whether Rule 41(d) authorizes attorney fees as part of an award of 'costs,'" App. 10a, the appellate court correctly sized up the lower-court record. *See also id.* ("The Sixth Circuit has recently recognized the split but declined to make a ruling") (citing *Duffy v. Ford Motor*, *supra*).

Over the past two decades, three schools of thought have emerged regarding the propriety of awarding attorney fees under Rule 41(d). The first, represented by the Sixth Circuit in the decision below, ostensibly focuses on the "plain language" of the provision. App. 10a-11a. In its view, "[w]here Congress has intended to provide for an award of attorney

fees, it has usually stated as much and not left the courts guessing." *Id.* at 10a. Also, because several other provisions of federal law explicitly provide for attorney fees—*see, e.g.*, Federal Rules of Civil Procedure 30(g)(2), 37(a)(4), 37(c), 37(d), 56(g), 28 U.S.C. § 1920—the Sixth Circuit believed that the absence of any such provision in Rule 41(d) establishes that such fees are not authorized. No other circuit subscribes to this view.

The second school of thought holds that district courts have discretion to award attorney fees as part of the costs that Rule 41(d) allows. These cases focus on the discretionary language of Rule 41(d), which authorizes district courts to award any costs that they "may deem proper." Adhering to this majority view are at least two courts of appeal, and countless district courts. The first appellate court is the Eighth Circuit. *See Evans v. Safeway Stores, Inc.*, 623 F.2d 121, 122 (8th Cir. 1980) (district courts have authority to award fees under Rule 41(d)); *Johnston v. Cartwright*, 355 F.2d 32, 40 (8th Cir. 1966) (same); *Mercantile-Commerce Bank & Trust Co. v. Southeast Ark. Levee Dist.*, 106 F.2d 966, 971 (8th Cir. 1939) ("in exceptional cases for dominating reasons" a trial court may award the prevailing party attorney's fees as part of the costs incurred under Rule 41(d)). The second is the Tenth Circuit. *See Meredith v. Stovall*, 216 F.3d 1087, 2000 WL 807355, at *1 (10th Cir. June 23, 2000) ("Under the language of Rule 41(d), the decision whether to impose costs and attorney's fees is within the discretion of the trial court"); *cf. Nolen v. Henderson Nat'l Corp.*, 986 F.2d 1428, 1993 WL 26817, at *4 (10th Cir. Feb. 5, 1993) ("Though a defendant may recover fees and costs with respect to a dismissal without prejudice, it cannot recover them where the dismissal is with prejudice barring exceptional circumstances") (construing Rule 41(a)).

In addition to these appellate courts, several district courts from these circuits and others have issued thoughtful opinions

explaining why trial courts retain discretion to make such awards. In *Behrle v. Olshansky*, 139 F.R.D. 370, 372-77 (W.D. Ark. 1991), the trial court carefully reviewed the case law in the area, ultimately determining that it had discretion to award fees for at least two reasons. One, it did not believe that the discretion vested in district courts under Rule 41(a) to condition the voluntary dismissal of an action on payment of fees "is different" from "that given to the court by Rule 41(d)." *Id.* at 373. The authorization of fee awards in the one setting carried over to the other. Two, the court thought that it made scant sense to treat the "costs" covered by Rule 41(d) as "exactly the same items of expense" as are taxed by the clerk of the court against the losing party under Rule 54(d). *Id.* at 373.

A like conclusion was reached in *Esquivel v. Arau*, 913 F. Supp. 1382 (C.D. Cal. 1996). "The fact that Rule 41(a)(2) has been a basis to impose fee award 'conditions' lends support to the proposition that Rule 41(d) 'costs' awards should also include attorneys' fees." *Id.* at 1391. Similar reasoning has been embraced by a host of other districts courts. *See Loubier v. Modern Acoustics, Inc.*, 178 F.R.D. 17, 22-23 (D. Conn. 1998) (awarding fees under Rule 41(d) because the rule is "discretionary" and because "the courts have generally allowed the recovery of attorney's fees as part of the costs"); *Katen v. Katen*, 1998 WL 721092, at *2 (E.D.N.C. Mar. 4, 1998) ("The language of the Rule is permissive, and allows the court to award costs 'as it may deem proper.' In light of the Rule's purpose, to deter vexatious and repetitive litigation, it seems proper that in certain circumstances, attorneys' fees should be taxed against the party seeking to refile a previously dismissed suit."); *Zucker v. Katz*, 708 F. Supp. 525, 539 (S.D.N.Y. 1989) (award under Rule 41(d) is "discretionary with the court"); *Whitehead v. Miller Brewing Co.*, 126 F.R.D. 581 (M.D. Ga. 1989); *Wahl v. City of Wichita*, 701 F. Supp. 1530, 1533 (D. Kan. 1988) (agreeing that trial courts have "broad discretion" to award costs and attorney fees under Rule 41(d) but

declining to award them in the case); *Eager v. Kain*, 158 F. Supp. 222, 223 (E.D. Tenn. 1957) ("if a plaintiff has once dismissed an action in any court, upon the commencement of an action including the same claim in a federal court, the court may require the payment of costs, including attorney's fees, of the previously dismissed action as a prerequisite to the filing of the action"). *See also Romero v. Universal Ogden Servs., Inc.*, No. 97-2744, 1997 WL 639011 (E.D. La. Oct. 15, 1997) (awarding attorney fees and costs under Rule 41(d)); *Kratage v. The Charter Township of Commerce*, 926 F. Supp. 102, 104 n.1 (E.D. Mich. 1996); *Int'l Controls & Measurements Corp. v. Watsco*, 853 F. Supp. 585, 592 (N.D.N.Y. 1994) (agreeing that Rule 41(d) "provides that the court has discretion to award . . . costs and fees" but declining to do so); *Goodrum v. United States*, 1993 WL 432346, at *1 (E.D. La. Oct. 14, 1993) ("Reasonable attorney's fees may be included in 'cost' imposed upon a plaintiff" pursuant to Rule 41(d)); *In re Wy. Tight Sands Antitrust Cases*, 121 F.R.D. 685, 688 (D. Kan. 1987) (including attorney fees as part of costs award under Rule 41(d)); *N.Y. Gold & Silver Futures Exch. v. Sec. Div., N.Y. State Attorney Gen.'s Office*, 1986 WL 2417, at *2 (S.D.N.Y. Feb. 18, 1986) ("Pursuant to Fed.R.Civ.P. 41(d), plaintiff is assessed reasonable costs, including attorney fees").

Still a third school of thought exists regarding this issue. These courts look less to the language of Rule 41(d), Rule 41(a) or other contextual clues, and more to whether the underlying cause of action independently authorizes attorney fees for the successful litigant. In *Esposito v. Piatrowski*, 223 F.3d 497 (7th Cir. 2000), for example, the Seventh Circuit reviewed a case in which the district court had awarded costs under Rule 41(d) that "included the payment of attorneys' fees." *Id.* at 500. On appeal, the repeat litigant argued that the district court had committed reversible error in compelling him to pay these costs before proceeding with the second complaint, and that the court further erred in eventually

dismissing his second case when he did not satisfy the terms of the order.

The Seventh Circuit disagreed. It first observed that "[t]here is no language in the text of Rule 41(d) indicating that Congress intended to alter the 'American Rule' as the rule does not refer to attorneys' fees as an awardable cost." *Id.* at 500. In that setting, the court reasoned, it would allow attorney fees only when the statute under which the claim was brought specifically permitted them. In the court's words, "we hold that a party may recover reasonable attorneys' fees as part of its 'costs' under Rule 41(d) only where the underlying statute defines costs to include attorneys' fees." *Id.* at 501.

Despite the court's characterization of its decision as a "hold[ing]," *id.*, its lengthy discussion of the issue, *id.* at 499-502, and its reliance on a prior Seventh Circuit decision in reaching this decision, *see Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073 (7th Cir. 1987), it is not altogether clear that the decision indeed amounts to a holding. *See* 223 F.3d at 501 (noting that the appellant challenged the entire costs award, not just the award of attorney fees). Any doubt about the controlling nature of *Esposito* within the Seventh Circuit, however, was removed four months later when the court relied on the decision in resolving a similar issue and indeed did not even find it necessary to publish the decision. In *Sanderson v. Spectrum Labs, Inc.*, No. 00-1872, 2000 WL 1909678 (7th Cir. Dec. 29, 2000), the court held that "[a]ttorneys' fees are generally not recoverable in the absence of an underlying statute or contract provision stating otherwise." *Id.* at *5 (citing *Esposito*). It then determined that because plaintiff had relied on the Lanham Act in bringing his claim and because the Act "provides for an award of attorneys' fees as part of a successful litigant's costs," it would "affirm the district court's award of attorneys' fees under Rule 41(d)." *Id.* Plainly, in this instance, the *Esposito* reasoning was necessary to the result. At least one lower court from another circuit has embraced this

view. *See Anders v. FPA Corp.*, 164 F.R.D. 383, 388-91 ("Since the legal authority governing the state action which gave rise to the Rule 41(d) award does not allow for the shifting of attorney's fees, this Court concludes that the costs awarded under Rule 41(d) in this instance do not include attorney's fees"), *order aff'd by* 1995 WL 785109, at *3 (D.N.J. Apr. 24, 1995) ("where the underlying substantive claim permits recovery of attorney's fees for the successful litigant . . . costs may include such attorney's fees as costs, but not otherwise").

All told, at least four courts of appeals have taken a stand on the issue presented, together with numerous district courts in other circuits. The split is recurring in nature and mature in its development. Even under the most forbearing application of the lower-court conflict considerations of Rule 10, this federal issue is ripe for review.

## II. The Sixth Circuit Erred in Concluding that the Plain Language of Rule 41(d) Deprives District Courts of Discretion to Award Attorney Fees.

Not only did the Sixth Circuit's decision deepen a pre-existing division in the lower courts, but it also incorrectly concluded that the "plain language" of Rule 41(d) precludes district courts from conditioning the refiling of a complaint on the payment of attorney fees. This, too, supports the writ.

In issuing a ruling in conflict with "the majority of courts" (App. 10a) that have addressed the question, the Sixth Circuit claimed that the "plain language" of Rule 41(d) required it to do so. That is not the case. Language, context, and the animating purpose of Rule 41(d) all establish that district courts may condition the refiling of a complaint on the payment of *all* costs incurred by the defendant in the first action, including all attorney fees prompted by the first complaint.

By its terms, Rule 41(d) empowers district courts with broad discretion to deter and penalize vexatious litigants. In full, it says:

> If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

Fed. R. Civ. P. 41(d).

To the extent plain language is the sole measure of this issue, the term "costs" hardly has the restrictive quality that the Sixth Circuit gave it. General as well as more specific definitions of the term clearly cover attorney fees. As a general matter, the term means "the amount or equivalent paid or given or charged or engaged to be paid or given for anything bought or taken in barter or for service rendered." Webster's Third New International Dictionary 515 (1981). And in the legal context, the term means an "expense incurred in litigation: as a: those payable to the attorney or counsel by his client esp. when fixed by law." *Id.* Legal dictionaries likewise say that the term means "the amount paid or charged for something," or "[t]he expenses of litigation, prosecution, or other legal transaction, esp. those allowed in favor of one party against the other." Black's Law Dictionary 349, 350 (7th ed. 1999). Surely a request for legal fees in defending an initial (and ultimately frivolous) action may fairly be characterized as "the expenses of litigation," "the amount paid or charged for something," or more broadly "the amount or equivalent paid or given or charged or engaged to be paid or given for anything."

As an initial matter, then, the court of appeals erred in holding that Rule 41(d) does not permit attorney fees because

"the rule does not explicitly provide for them." By any definition of "costs," the Rule in fact does provide for them.

In reaching a contrary interpretation, it appears that the court of appeals in reality did not rely upon the "plain language" of Rule 41(d) (*see* App. 10a-13a) but rather upon the *context* in which that Rule appears. As the lower court elsewhere indicated: "Where Congress has intended to provide for an award of attorney fees, it has usually stated as much and not left the courts guessing." App. 10a. It then noted that while "Rule 41(d) only speaks of 'costs' and does not mention attorney fees, several other provisions in the Federal Rules explicitly provide for recovery of attorney fees." App. 11a (citing Rules 30(g)(2), 37(a)(4), 37(c), 37(d) & 56(g)).

This consideration of the context in which Rule 41(d) appears of course asks an appropriate statutory-interpretation question, but in the end supplies an inaccurate answer to it. No doubt the definition of "costs" may be informed by "the company it keeps" and the context in which it appears. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995); *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961); *see Gutierrez v. Ada*, 120 S. Ct. 740 (2000). But the first essential inquiry is whether other portions of *Rule 41*, not other separate Federal Rules or other separate Acts, offer any insight into the meaning of the term. One first ascertains the relational meaning of a term by looking at its siblings, not its second cousins. *Cf. United States v. Cooper Corp.*, 312 U.S. 600, 606-07 (1941) ("[t]he connotation of a term in one portion of an Act may often be clarified by reference to its use in others"). And here other aspects of Rule 41(d) and other subsections of the Rule confirm what the dictionaries indicate—the term "costs" includes all expenses, including attorney fees.

The Sixth Circuit's cramped interpretation of "costs" for example cannot be squared with the discretion-giving language that animates Rule 41(d). It says that "the court *may* make such order for the payment of costs of the action previously

*dismissed as it may deem proper* and *may* stay *the proceedings* in the action until the plaintiff has complied with the order." (Emphasis added). It would require an odd construction of the Rule to believe that it initially vested the district courts with such broad discretion on the one hand, then took it away with the other by defining costs to cover the most narrow and most inconsequential of categories. All lower courts agree that "the purpose of Rule 41(d) . . . [was] to deter forum shopping and vexatious litigation," *Esposito*, 223 F.3d at 501 (citation omitted), and of course vexatious litigation is far more likely to spark an increase in attorney fees than filing fees and other litigation expenses. Yet under the Sixth Circuit's view, the more vexatious the first round of litigation the less likely that the defendant will recover all of its out-of-pocket expenses. That cannot be what the drafters of the Rule had in mind.

A second contextual clue bolsters this construction. Rule 41(a) allows plaintiffs voluntarily to dismiss their claims without prejudice in two situations—(1) without an order of the court by filing a notice of dismissal before an answer (or dispositive motion) has been filed or with the consent of all parties, and (2) with permission of the court. Fed. R. Civ. P. 41(a). In the latter circumstance, the court may dismiss the case without prejudice "upon such terms and conditions as the court deems proper." Fed. R. Civ. P. 41(a)(2). This broad language, all courts have agreed, allows trial courts to condition the dismissal of the case upon the payment of costs *and* attorney fees. *See LeBlang Motors, Ltd. v. Subaru of Am., Inc.*, 148 F.3d 680, 686-87 (7th Cir. 1998); *Painter v. Golden Rule Ins. Co.*, 121 F.3d 436, 440-41 (8th Cir. 1997); *AeroTech, Inc. v. Estes*, 110 F.3d 1523, 1528 (10th Cir. 1997); *Westlands Water Dist. v. United States*, 100 F.3d 94, 97 (9th Cir. 1996); *Marlow v. Winston & Strawn*, 19 F.3d 300, 303 (7th Cir. 1994); *McLaughlin v. Cheshire*, 676 F.2d 855, 856-57 (D.C. Cir. 1982); *GAF Corp. v. Transamerica Ins. Co.*, 665 F.2d 364, 367 (D.C. Cir. 1981); *Am. Cyanamid Co. v. McGhee*, 317 F.2d 295, 298 (5th Cir. 1963); 8 Moore's

Federal Practice, § 41.70(6). *See* Advisory Committee Notes to 1946 Amendment to Rule 41 (requiring court approval of dismissal not only after defendants file an answer but also after they file a summary judgment motion "[s]ince such a motion may require even more research and preparation than the answer itself").

Under these circumstances, it would be surpassingly strange to credit the drafters of Rule 41 simultaneously with empowering district courts with broad authority to condition a dismissal upon the payment of fees, then with no discretion regarding the payment of fees when the second action in fact *is* filed. One concerned with the former situation (the need to award fees when a second action *may* be filed) would assuredly be concerned with the latter situation (the need to award fees when a second action *has* been filed). *See Key Tronic Corp. v. United States*, 511 U.S. 809, 815 (1994) (recognizing attorney fees may be permitted under the Federal Rules even when they are not expressly provided for "if the statute otherwise evinces an intent to provide for such fees").

Nor does the "American Rule" support the Sixth Circuit's decision. First, contrary to the appellate court's assumption, it is exceedingly doubtful that the assumption behind the American Rule—that successful and unsuccessful litigants will bear their own attorney fees—applies here. The question in this case is not the traditional one presented in attorney-fee disputes: Is there authority for shifting fees from the loser to the winner after the case has ended? *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). Here, fees are imposed *before* the court knows who the eventual winner will be, and immediately *after* the plaintiff files a second action. This in short is not an attempt to import the British loser-pay rule. It is an attempt to deter litigation tactics that are either vexatious or tactical, or in some instances both. Here, for example, even the Sixth Circuit noted that plaintiff's decision to dismiss the first case "after she had missed the

court's deadline for disclosing her expert witnesses . . . evidences at least some attempt to wipe the slate clean after an initial setback in federal court and gain a tactical advantage by re-filing." App. 10a. On this record, a fee-shifting rule has nothing to do with the American, British or any other common-law assumption. It instead is a concrete way of assuring that litigants allowed voluntarily to dismiss their cases may not refile the case solely to gain an advantage in the underlying litigation.

All things considered, the Sixth Circuit erred. The language of the Rule, the context in which it appears and the function it serves all confirm that Rule 41(d) permits an award of attorney fees. This mistake independently supports the writ.

## III. The Question Presented Is Recurring in Nature and Its Proper Resolution Will Provide an Important Litigation-Management Tool to the Lower Courts.

Besides implicating a question that has divided the lower courts and besides answering that question incorrectly, the Sixth Circuit's decision addresses an issue that affects the day-to-day functioning of the lower courts and whose resolution will eliminate an uncertainty in the law that has lasted for more than six decades. The question should be addressed now rather than later.

Rule 41(d) dates from 1938. Not only has the Court failed to address the contours of the Rule since then but it has not even had an opportunity to do so. To our knowledge, not a single certiorari petition has been presented to the Court regarding this issue during that time. A brief examination of the facts of this case explains why.

The award in this case totals just $1,766.55—$185.00 in costs and $1,581.55 in attorney fees. The other lower-court cases in this area involve equally modest awards. The size of these awards not only explains why no other certiorari petitions

have been filed but also explains why there are so many more district court opinions regarding this issue than there are court of appeals decisions. Few litigants will find it cost-effective to contest an issue at the court of appeals when the expenses of one layer of appellate review frequently will dwarf the award itself.

But this truth does not undermine the significance of the issue or its importance to the lower courts; it merely explains why more lower-court decisions do not proceed through the appellate system. If not now, moreover, it is fair to ask when the Court will be presented with an opportunity to review this question. One certiorari petition in 63 years does not bode well for future opportunities to resolve a question that the Sixth Circuit itself acknowledged has created "a split of authority." App. 10a.

Money alone, at any rate, has never been the sole (or even the best) harbinger of Supreme Court review. The fact is, one district court after another has found uncertainty in this area when by now there ought to be clarity. *See Anders*, 164 F.R.D. at 389 ("[T]here is a paucity of case law on the interpretation of the language of Rule 41(d)"); *Behrle*, 139 F.R.D. at 374 ("There is a dearth of case law on this issue"); *Esquivel*, 913 F. Supp. at 1390 (observing that "there is a puzzling lack of discussion in the cases of the theoretical underpinnings for such an award" under Rule 41(d)). And in an age when the meek and brazen alike are calling on the courts to resolve all manner of social, political and business disputes, it is difficult to perceive the virtues of allowing that uncertainty to persist—particularly when it comes to a provision that all agree was designed to eliminate vexatious litigation tactics. Yet, today, all trial judges within the Sixth Circuit will not be able to use the most formidable weapon against such tactics—the threat of attorney-fee awards. It is doubtful whether a single sharp-edged litigant will find the

possibility of a Rule 41(d) sanction that does not include such expenses to be a threat of any meaningful consequence at all.

Nor has the confusion generated by this uncertainty escaped the notice of legal commentators. One law review article has been devoted exclusively to the issue, while several others have noted the lack of resolution regarding it. *See* Clinton, *Does Rule 41(d) Authorize an Award of Attorney's Fees?* 71 St. John's L. Rev. 81 (1997); Jane P. Mallor, *Punitive Attorneys' Fees for Abuses of the Judicial System*, 61 N.C. L. Rev. 613, 644 (1983); Rochelle Cooper Dreyfuss, *Promoting the Vindication of Civil Rights Through the Attorney's Fees Award Act*, 80 Colum. L. Rev. 346, 349 (1980); Joseph C. Kopec, Note, *The Use of Rule 11 Sanctions and Prevailing Party Fee-Shifting Statutes After Rule 41(a)(1)(i) Notice Dismissal*, 88 Colum. L. Rev. 1512, 1526 (1988) (discussing the interplay between Rule 54(d)'s costs and attorney fees provisions and Rule 41(d)).

In the last analysis, this petition cleanly presents the issue, involves a square holding on point and allows the Court to address the question in precisely the context in which it most frequently arises. It is hard to see a tenable justification for allowing this uncertainty in the law to continue, and even less justification for assuming that other opportunities will arise shortly to address it.

## CONCLUSION

The petition should be granted.

Respectfully submitted,

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# APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 99-6348

SHIRLEY K. ROGERS,
Plaintiff - Appellant,
v.

WAL-MART STORES, INC.,
Defendant - Appellee.

Before: GUY and MOORE, Circuit Judges;
DOWD, District Judge.

**JUDGMENT**

On Appeal from the United States District Court
for the Western District of Tennessee at Memphis.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court denying plaintiff Shirley Rogers's motion to remand is AFFIRMED and the court's award of costs insofar as it awarded attorney fees is VACATED. IT IS FURTHER ORDERED that the case is REMANDED for further proceedings in accordance with the opinion of this court.

**ENTERED BY ORDER OF THE COURT**

/s/ Leonard Green
Leonard Green, Clerk

Dated: October 26, 2000

# UNITED STATES COURT OF APPEALS
# FOR THE SIXTH CIRCUIT

**SHIRLEY K. ROGERS,**
**Plaintiff-Appellant,**

**v.**

**WAL-MART STORES, INC.,**
**Defendant-Appellee.**
**No. 99-6348**

Decided Oct. 26, 2000

DOWD, District Judge.

## I. Introduction

This case arises out of injuries suffered by Shirley K. Rogers when she tripped and fell on a wooden pallet located in the aisle of a Wal-Mart store in Memphis, Tennessee. Rogers contends that employees of Wal-Mart acted negligently in leaving the pallet in a shopping area.

On October 17, 1997, Rogers filed a complaint in Tennessee state court asserting her negligence claims and seeking approximately $950,000 in damages. On November 18, 1997, Wal-Mart answered and removed to the United States District Court for the Western District of Tennessee on the grounds of complete diversity among the parties and an amount in controversy exceeding $75,000. On October 9, 1998, the parties stipulated to dismissal, and on October 14, 1998, the district court entered an order dismissing the case without prejudice.

On February 4, 1999, Rogers filed a new complaint in Tennessee state court. The second complaint, arising out of the same occurrence, specified that Rogers sought to recover an amount "not exceeding $75,000." Wal-Mart filed another

notice of removal based on answers to interrogatories in the first case in which Rogers estimated her damages at $447,000. Rogers filed a motion to remand on May 14, 1999, asserting that the amount-in-controversy requirement for diversity jurisdiction had not been met. Along with her motion to remand, Rogers submitted an affidavit stating that she "had no intention of seeking additional damages against Wal-Mart Stores, Inc." and that she had "instructed [her] attorney to stipulate that [her] demand for damages will not exceed $75,000 at any time in the future." Rogers also attached a stipulation admitting that her total damages did not exceed $75,000 and stating that she would not seek leave of court to amend her complaint for additional damages. Meanwhile, Wal-Mart moved the district court, pursuant to Fed. R. Civ. P. 41(d), to award costs and fees for the previously dismissed action.

The district court denied Rogers' motion to remand on June 23, 1999. On the same day, the district court granted Wal-Mart's Rule 41(d) motion and ordered Rogers to pay costs and attorney fees from the original action representing work that would not benefit Wal-Mart in the second action. The district court also stayed the proceedings and gave Rogers fourteen days to pay Wal-Mart the costs and fees. On September 2, 1999, the district court dismissed the case without prejudice due to Rogers' non-payment of Wal-Mart's costs and fees from the first action.

Rogers has appealed the district court's June 23, 1999 Order denying her motion to remand; its Order of June 23, 1999 granting costs under Fed. R. Civ. P. 41(d); and its Order and Judgment entered on September 2, 1999 dismissing the case without prejudice with costs taxed to the plaintiff.

## II. Removal

We review *de novo* the existence of subject matter jurisdiction as a question of law; factual determinations

regarding jurisdictional issues are reviewed for clear error. *See Gafford v. General Elec. Co.*, 997 F.2d 150, 155 (6th Cir. 1993). We also review *de novo* the denial of a motion to remand. *See Ahearn v. Charter Twp. of Bloomfield*, 100 F.3d 451, 453 (6th Cir. 1996).

Generally, a civil case brought in a state court may be removed by a defendant to federal court if it could have been brought there originally. 28 U.S.C. § 1441(a). A federal district court has original "diversity" jurisdiction where the suit is between citizens of different states and the amount in controversy exceeds $75,000, exclusive of costs and interest. 28 U.S.C. 1332(a). A defendant removing a case has the burden of proving the diversity jurisdiction requirements. *See Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921).

A problem arises where, as here, a plaintiff alleges an amount in controversy below the jurisdictional amount. Generally, because the plaintiff is "master of the claim," a claim specifically less than the federal requirement should preclude removal. *See Gafford v. General Elec. Co.*, 997 F.2d 150, 157 (6th Cir. 1993). State counterparts to Fed. R. Civ. P. 54(c) might enable a plaintiff to claim in her complaint an amount lower than the federal amount in controversy but nevertheless seek and recover damages exceeding the amount prayed for. *Id.* Tennessee has one such rule. Its Civil Procedure Rule 54.03 provides that, except in the case of default, "every final judgment shall grant relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." In such situations, the removing defendant must show that it is "more likely than not" that the plaintiff's claims meet the amount in controversy requirement. *Gafford*, 997 F.2d at 158.

To meet its burden for removal, the defendant in this case relied on the fact that plaintiff's first action sought nearly $1 million and that plaintiff made sworn responses to discovery requests stating that her amount of damages exceeded

$447,000. The district court cited these facts in finding that it was more likely than not that the amount in controversy exceeded $75,000. Rogers, however, argues that the district court should have granted her motion to remand because she (1) filed a complaint in the second action seeking damages under the jurisdictional amount; and (2) stipulated that her damages were under the required amount in controversy for diversity jurisdiction.

Neither of these facts suffices to require a remand to state court. This circuit has recognized a rule that the determination of federal jurisdiction in a diversity case is made as of the time of removal. *See Ahearn v. Charter Twp. of Bloomfield*, 100 F.3d 451, 453 (6th Cir. 1996). Hence, in reviewing the denial of a motion to remand, a court looks to "whether the action was properly removed in the first place." *Id.* (citing *Fakouri v. Pizza Hut of Am., Inc.*, 824 F.2d 470, 472 (6th Cir. 1987)). If one does not take into account plaintiff's post-removal stipulation, then there is no question that the district court was correct to deny the motion to remand because defendant showed that, at the time of removal, the amount in controversy was "more likely than not" above the $75,000 pleaded in plaintiff's complaint.[1]

Therefore, the main issue here is the effect, if any, of plaintiff's stipulation. The Seventh Circuit has held that a post-removal stipulation reducing the amount in controversy to below the required jurisdictional amount is ineffective to deprive a district court of jurisdiction. *See In re Shell Oil Co.*, 970 F.2d 355, 356 (7th Cir. 1992). The court based its decision

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[1] Plaintiff argues that if the amount prayed for in a complaint may be disregarded in determining the amount in controversy, it would "open the floodgates" to federal jurisdiction over any cases filed in state court. This argument has long since been settled by cases like *Gafford*, which establish tests for determining when a court can find jurisdiction despite a pleading that states an amount below the required level.

on *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283 (1938), in which the Supreme Court considered whether a post-removal amendment of a complaint could destroy diversity jurisdiction. In ruling that it could not, the *St. Paul* Court stated that "[e]vents occurring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction." *Id.* at 290. On the strength of this rule, the *Shell Oil* court reasoned that "because jurisdiction is determined as of the instant of removal, a post-removal affidavit or stipulation is no more effective than a post-removal amendment of the complaint." 970 F.2d at 356; *see also Chase v. Shop 'N Save Warehouse Foods, Inc.*, 110 F.3d 424, 429 (7th Cir. 1997) ("because the stipulation came one month post-removal, [it was] too late for the court to consider").

Although no published opinion of this circuit has directly addressed the effect of a post-removal stipulation on diversity jurisdiction, in *Sanford v. Gardenour*, No. 99-5504, 2000 WL 1033025 (6th Cir. July 17, 2000), the court found there was jurisdiction even though the plaintiffs had stipulated after removal that "the amount they were seeking was less than $75,000." *Id.* at *2. The plaintiffs had made Rule 26 disclosures that the amount of damages was about $500,000. In addition, the plaintiffs' stipulation had not been binding—a fact the court used to distinguish its case from several district court cases that had given effect to a binding post-removal stipulation. *Id.* at *3. Also, in *Mitchell v. White Castle Sys., Inc.*, No. 94-1193, 1996 WL 279863 (6th Cir. May 24, 1996), although noting that the plaintiff had offered to file a post-removal stipulation, the court interpreted *St. Paul* as holding that "a post-removal stipulation has no effect on federal jurisdiction over the original complaint." *Id.* at **2 n.2.

We conclude that post-removal stipulations do not create an exception to the rule articulated in *St. Paul*. Because jurisdiction is determined as of the time of removal, events

occurring after removal that reduce the amount in controversy do not oust jurisdiction. Therefore, consistent with *St. Paul* and previous unpublished Sixth Circuit opinions, we hold that a post-removal stipulation reducing the amount in controversy to below the jurisdictional limit does not require remand to state court. This rule is grounded not only in precedent, but also in sound policy. If plaintiffs were able to defeat jurisdiction by way of a post-removal stipulation, they could unfairly manipulate proceedings merely because their federal case begins to look unfavorable. Moreover, the interests of simplicity and uniformity dictate that post-removal stipulations be treated just like any other post-removal event.

Several district courts have given effect to binding, post-removal stipulations; however, we do not see merit in their reasoning. In *Moss v. Voyager Ins. Cos.*, 43 F. Supp. 2d 1298 (M.D. Ala. 1999), the court distinguished cases from the Fifth, Sixth and Seventh Circuits on the ground that the stipulations in those cases had "failed to specifically bind the plaintiffs to accept no more in damages than the requisite jurisdictional amount." *Id.* at 1302; *see also Adkins v. Gibson*, 906 F. Supp. 345 (S.D. W.Va. 1995). Reaching the same result with different reasoning, the courts in *Bailey v. Wal-Mart Stores, Inc.*, 981 F. Supp. 1415 (N.D. Ala. 1997) and *Goodman v. Wal-Mart Stores, Inc.*, 981 F. Supp. 1083 (M.D. Tenn. 1997) ruled that the 1988 amendments to 28 U.S.C. § 1447(c) superseded the *St. Paul* rule that post-removal actions by the plaintiff cannot deprive a court of diversity jurisdiction.[2] Those courts reasoned that in changing § 1447(c), Congress was responding to *St. Paul*. Further, they interpreted the word "shall" in the newer version to mandate remand—even where

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[2] The older version of § 1447(c) called for remand whenever the judge realized "that the case was removed improvidently and without jurisdiction." This subsection was changed to read: "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."

the plaintiff reduces his demand three days before trial or merely amends his complaint rather than submits a stipulation. *Bailey*, 981 F. Supp. at 1415; *Goodman*, 981 F. Supp. at 1084; *see also Oder v. Buckeye State Mut. Ins.*, 817 F. Supp. 1413, 1414 (S.D. Ind. 1992).

Although these cases are interesting for their result, this circuit has already rejected the notion that the 1988 amendment to § 1447(c) directs district courts to look beyond the time of removal in deciding remand motions based on lack of jurisdiction. *Baldridge v. Kentucky-Ohio Transp., Inc.*, 983 F.2d 1341, 1348 & n.11 (6th Cir. 1993); *see also Fuller v. Exxon Corp.*, 78 F. Supp. 2d 1289, 1297 n.16 (S.D. Ala. 1999) (discussing cases and concluding that the 1988 amendments do not supersede *St. Paul*). In addition, the fact that a stipulation might be binding should not determine whether it is effective to deprive the federal court of diversity jurisdiction. The same potential for forum shopping and manipulation exists whether or not a stipulation is binding. The same interests in efficiency and simplicity also exist where there is a binding stipulation. Hence, the reasoning that leads us to deny effect to post-removal stipulations generally, also leads us to deny effect to post-removal stipulations that are binding.[3]

Because state law would have allowed plaintiff to recover damages in excess of what she prayed for, it was "more likely than not" that her damages would exceed $75,000 given her previous demands and representations. Plaintiff's post-removal stipulation has no effect because jurisdiction is decided as of

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[3] The defendant has argued that its lack of approval means the stipulation is not binding. Other courts have treated such stipulations as binding nonetheless. *See, e.g., Asociacion Nacional de Pescadores a Pequena Escala O Artesanales de Colombia v. Dow Quimica de Colombia, S.A.*, 988 F.2d 559, 565 (5th Cir. 1993), *cert. denied*, 510 U.S. 1041 (1994); *Adkins v. Gibson*, 906 F. Supp. 345, 348 (S.D. W.V. 1995). We find defendant's argument unconvincing and do not rely on it.

the time of removal. The district court did not err in denying plaintiff's motion to remand.

**III. The Award of Costs, Including Attorney Fees**

The district court thoroughly examined Wal-Mart's itemized accounting of the costs and fees it incurred in defending against Rogers' earlier suit. The court awarded the full $185 in costs, but reduced the $1,888 of requested attorney fees by $306.45, to account for those fees which "remain[ed] of benefit in this matter[.]" The court ordered Rogers to pay Wal-Mart $1766.55. Rogers has contested this award of "costs" and the subsequent dismissal of her case.

Fed. R. Civ. P. 41(d) provides:

> If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

A district court's grant of a Rule 41(d) motion and related order of dismissal are reviewed for abuse of discretion. *See Duffy v. Ford Motor Co.*, 218 F.3d 623, 633 (6th Cir. 2000).

Rogers declares that she "merely wished to litigate her claims in state court" and relies on a couple of cases in which a court refused to award costs under Rule 41(d) because the court found no evidence of vexatious intent. *See Wahl v. City of Wichita*, 701 F. Supp. 1530, 1533 (D. Kan. 1988); *Sewell v. Wal-Mart Stores, Inc.*, 137 F.R.D. 28 (D. Kan. 1991). Rogers' claim of pure motive does not win the day because "nothing in the language of Rule 41(d) . . . suggests that a defendant must show 'bad faith' before a district court can order payment of costs incurred in a voluntarily dismissed previous action." *Esquival v. Arau*, 913 F. Supp. 1382, 1388 (C.D. Cal. 1996).

In addition, Rogers fails to mention that Rule 41(d) is meant not only to prevent vexatious litigation, but also to prevent forum shopping, "especially by plaintiffs who have suffered setbacks in one court and dismiss to try their luck somewhere else." *See Robinson v. Nelson*, No. 98-10802- MLW, 1999 WL 95720, at *2 (D. Mass. Feb. 18, 1999). Hence, Rule 41(d) is also intended to prevent attempts to "gain any tactical advantage by dismissing and refiling th[e] suit." *Sewell v. Wal-Mart Stores, Inc.*, 137 F.R.D. at 29.

As Wal-Mart points out, Rogers did not seek to dismiss the initial action until after she had missed the court's deadline for disclosing her expert witnesses. This evidences at least some attempt to wipe the slate clean after an initial setback in federal court and gain a tactical advantage by re-filing in state court. Hence, the district court did not abuse its discretion in awarding costs of $185 to Wal-Mart.

Rogers also specifically contests the district court's inclusion of attorney fees as part of its award of "costs" under Rule 41(d). There is a split of authority as to whether Rule 41(d) authorizes attorney fees as part of an award of "costs," but it seems that the majority of courts find that attorney fees are available under Rule 41(d). The Sixth Circuit has recently recognized the split but declined to make a ruling: "although . . . most courts have concluded that attorney fees may be awarded under Rule 41(d), the matter is far from settled in this circuit or in most others." *Duffy v. Ford Motor Co.*, 218 F.3d at 632.

We now hold that attorney fees are not available under Rule 41(d). The reason is simple—the rule does not explicitly provide for them. Where Congress has intended to provide for an award of attorney fees, it has usually stated as much and not left the courts guessing. Further, the law generally recognizes a difference between the terms "costs" and "attorney fees" and we have no desire to conflate the two terms. Rather, we must

assume that Congress was aware of the distinction and was careful with its words when it approved Rule 41(d).[4]

We realize that an award of attorney fees may be authorized, even if not expressly provided for, "if the statute otherwise evinces an intent to provide for such fees." *Key Tronic Corp. v. United States*, 511 U.S. 809, 815 (1994). However, the structure of the Federal Rules of Civil Procedure is ambiguous at best on the question of attorney fees. For instance, whereas Rule 41(d) only speaks of "costs" and does not mention attorney fees, several other provisions in the Federal Rules explicitly provide for recovery of attorney fees.

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[4] Of course, we realize that Congress itself did not choose the words contained in the rule. The language actually resulted once Congress declined to exercise its veto power following the usual rule-making process. One commentator has described this process succinctly:

> . . . The Supreme Court has the power to "prescribe general rules of practice and procedure" for the federal courts, and the Judicial Conference of the United States has the authority to recommend rule changes to the Supreme Court. The Judicial Conference in turn oversees a committee structure that includes a Standing Committee on Rules of Practice and Procedure appointed by the Chief Justice of the Supreme Court and various advisory committees accountable to the Standing Committee. The Advisory Committee on Civil Rules, which consists of judges, lawyers, and legal academics, is responsible for the Federal Rules of Civil Procedure.
>
> There are several stages in the rulemaking process. A proposed rule is first considered by the Advisory Committee. If the Advisory Committee approves the proposal, it is then reviewed by the Standing Committee and finally by the Judicial Conference before being forwarded to the Supreme Court. If the Supreme Court concurs, the proposal is transmitted to Congress, which then has roughly seven months to exercise a veto. In the absence of a veto, the proposed rule goes into effect.

Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 Geo. L.J. 887, 892-93 (footnotes omitted).

*See Simeone v. First Bank Nat'l. Ass'n*, 125 F.R.D. 150, 155 (D. Minn. 1989) (listing Fed. R. Civ. P. 30(g)(2), 37(a)(4), 37(c), 37(d) & 56(g)). In addition, Title 28 U.S.C. § 1920 lists the items a court may tax as "costs" to a prevailing party under Rule 54(d) but does not include attorney fees. *Id.*; *see also Anders v. FPA Corp.*, 164 F.R.D. 383, 390 (D.N.J. 1995) (denying attorney fees in part because of lack of express authorization). The non-inclusion of attorney fees under § 1920 indicates that, at least in some contexts, Congress does not consider attorney fees to be part of an award of "costs."

Of course, many courts have permitted an award of attorney fees under Rule 41(d). They often rely on what they consider to be the policy behind the rule and, in our view, give too little weight to its plain language. *See, e.g., Behrle v. Olshansky*, 139 F.R.D. 370, 372-73 (W.D. Ark. 1991). In addition, some courts find attorney fees available under Rule 41(d) because, in their view, there ought to be a certain parallelism between Rule 41(d) and Rule 41(a)(2), which also does not explicitly mention attorney fees. In *Esquival v. Arau*, 913 F. Supp. 1382, 1391 (C.D. Cal. 1996), for instance, the court reasoned that because Rule 41(a)(2) permits a court to condition voluntary dismissal without prejudice on payment of attorney fees, Rule 41(d) also ought to permit attorney fees. The reasoning is that because both rules are intended to prevent vexatious litigation and forum shopping, "it would be inconsistent to conclude that a court has discretion to condition Rule 41(a)(2) voluntary dismissal without prejudice on payment of attorney fees, but that a court does not have discretion to exact the same payment from a plaintiff who has noticed a Rule 41(a)(1) dismissal in a previous case." *Esquival*, 913 F. Supp. at 1391.

One commentator accounts for this "anomaly" by suggesting that Rule 41(a)(2) contemplates a negotiation between the court and the litigant, but Rule 41(d) does not. Hence, these two rules are meant to "operate differently." *See*

Edward X. Clinton, Jr., *Does Rule 41(d) Authorize an Award of Attorney's Fees?*, 71 St. John's L. Rev. 81, 86 (1997). We do not hang our hat on this rationale; but we note it as further evidence that the structure of the Federal Rules of Civil Procedure is not so clear on this issue that it overcomes the absence of an express provision for attorney fees in Rule 41(d). In short, we are persuaded by the fact that Congress did not explicitly provide for attorney fees in Rule 41(d). We do not find that the structure of the Civil Rules is so unambiguous that we can divine a contrary intent on the part of Congress. And we think it improper to essentially re-draft the rule ourselves by reading into it language that is not there.

For these reasons, that portion of the district court's order which awarded Wal-Mart $1581.55 in attorney fees cannot stand.

## IV. Conclusion

We AFFIRM the district court's denial of the motion to remand and we VACATE the district court's award of costs insofar as it awarded attorney fees. Further, we REMAND with instructions for the district court to enter an order that, upon payment of costs in the sum of $185 within thirty (30) days of the date of the district court's order, plaintiff's case will be reinstated on the district court docket.

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF TENNESSEE**
**WESTERN DIVISION**

---

SHIRLEY K. ROGERS,

VS

WAL-MART STORES, INC.

JUDGMENT IN A CIVIL CASE

CASE NO. 99-2342 M1/A

---

**DECISION BY COURT.** This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

**IT IS SO ORDERED AND ADJUDGED** that, in accordance with the Order of Dismissal Without Prejudice filed September 2, 1999, this case is DISMISSED without prejudice with costs taxed to the Plaintiff, Shirley K. Rogers.

APPROVED:

/s/ Jon P. McCalla
JON PHIPPS MCCALLA
UNITED STATES
DISTRICT COURT

9/2/99
Date

ROBERT R. DI TROLIO
Clerk of Court

[illegible]
(By) Deputy Clerk

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TENNESSEE**
**WESTERN DIVISION**

---

SHIRLEY K. ROGERS,

Plaintiff,

vs. No. 99-2342 M1/A
**JURY DEMANDED**

WAL-MART STORES, INC.,

Defendant.

---

**ORDER DISMISSING CASE**
**WITHOUT PREJUDICE**

---

As the Court instructed in its June 23, 1999 Order in this matter, Defendant, Wal-Mart Stores, Inc., has filed an itemized accounting of the costs and fees it incurred in defending against an earlier suit of Plaintiff Shirley K. Rogers.

On August 16, 1999, this Court instructed Plaintiff to Pay Defendant $1,766.55 within fourteen days on the entry of the Order and notify the Court that she has made payment or the Court will dismiss the matter without prejudice.

As Plaintiff has not paid Defendant the aforementioned amount and the fourteen day period has passed, in accordance with this Court's earlier ruling, this case is hereby dismissed with Costs taxed to Plaintiff.

So ORDERED this the 2 day of Sept., 1999.

/s/ Jon P. McCalla
JON PHIPPS McCALLA
U.S. DISTRICT
COURT JUDGE

PREPARED BY:

/s/ Cameron C. Jehl
CAMERON C. JEHL, #18729
W.O. LUCKETT, JR., #10871
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ATTORNEYS FOR DEFENDANT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

| | | |
|---|---|---|
| SHIRLEY K. ROGERS, | ) | |
| Plaintiff, | ) | |
| vs. | ) | No. 99-2342 M1/A |
| WAL-MART STORES, INC., | ) | |
| Defendant. | ) | |

ORDER GRANTING DEFENDANT'S MOTION

This matter is before the Court on Defendant Wal-Mart's motion for costs and for a stay pursuant to Federal Rule of Civil Procedure 41(d). For the reasons stated, the Court GRANTS the motion.

On October 17, 1997, Plaintiff Shirley K. Rogers filed a tort action governed by Tennessee law in a Tennessee court. As Plaintiff sought damages well in excess of $75,000 and complete diversity of the parties existed, Defendant Wal-Mart Stores removed the matter to this Court on November 18, 1997. After Defendant filed its answer in this matter, the parties submitted a Stipulation of Dismissal Without Prejudice on October 9, 1998. Accordingly, the Court dismissed the matter on October 14, 1998.

Plaintiff subsequently refiled her suit in state court. The second complaint was essentially identical to the first, except this time she only claimed damages of $75,000. Defendant again removed the matter to this Court where, for the reasons

discussed at June 8, 1999 conference in this matter, the Court denied Plaintiff's remand motion and determined that it had subject matter jurisdiction over the complaint.

Rule 41(d) of the Federal Rules of Civil Procedure provides:

> **Costs of Previously-Dismissed Action.** If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

Pursuant to this section, Defendant seeks an award of costs and an order staying the action until Plaintiff complies with that order.

An award under this rule lies within the sound discretion of the trial court. Hython v. City of Steubenville, 94 F.3d 644, 1996 WL 456032, at *1 (6th Cir. Aug. 12, 1996). Plaintiff has advanced no valid reason for dismissing her original complaint; it is clear from the discussion at the June 8 conference that her attorney merely wished to conduct this litigation in state court. This desire, however, is not sufficient to impose additional and unnecessary costs upon her adversary.

Accordingly, the Court ORDERS Plaintiff to reimburse Defendant for any costs and attorneys' fees incurred in the original litigation on matters that will not be useful in this current matter; Plaintiff need not pay for research and review that remain of benefit to Defendant's case. See Katen v. Katen, No. 5:97-CV-275-BR(2), 1998 WL 721092, at *2 (E.D.N.C. Mar. 4, 1998); Esquival v. Arau, 913 F. Supp. 1382, 1388 (C.D. Cal. 1996); Behrle v. Olshansky, 139 F.R.D. 370, 376 (W.D. Ark. 1991).

Within fifteen days of entry of this order, Defendant must file an itemized accounting of the fees and costs it seeks. If Plaintiff contests any items for which Defendant seeks reimbursement, she must file detailed objections within fifteen days of Plaintiff's filing. Otherwise, Plaintiff must pay Defendant the amount requested within forty-five days or the Court will dismiss the matter without prejudice.

For the reasons stated, the Court GRANTS the motion of Defendant and STAYS all proceedings in this matter until Plaintiff pays Defendant for the costs and fees incurred in the original litigation of this matter.

ENTERED this 23 day of June, 1999.

/s/ Jon P. McCalla
JON P. McCALLA
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

| | | |
|---|---|---|
| SHIRLEY K. ROGERS. | ) | |
| Plaintiff, | ) | |
| v. | ) | No. 97-3057 M1/A |
| WAL-MART STORES, INC. | ) | |
| Defendant. | ) | |

ORDER DISMISSING CASE

Pursuant to the Stipulation of Dismissal Without Prejudice filed by the parties October 9, 1998, wherein the parties stipulate to the dismissal of this matter pursuant to Rule 41, this case is hereby DISMISSED without prejudice.

IT IS SO ORDERED THIS 14 DAY OF October 1998.

/s/ Jon P. McCalla
JON P. McCALLA
UNITED STATES
DISTRICT JUDGE

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF TENNESSEE**
**WESTERN DIVISION**

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SHIRLEY K. ROGERS,

**JUDGMENT IN A CIVIL CASE**

VS.

**CASE NO. 97-3057 M1/A**

WAL-MART STORES, INC.

---

**DECISION BY COURT.** This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

**IT IS SO ORDERED AND ADJUDGED** that, in accordance with the Order Dismissing Case, filed October 14, 1998, this case is DISMISSED WITHOUT PREJUDICE.

APPROVED:

/s/ Jon P. McCalla
JON PHIPPS MCCALLA
UNITED STATES
DISTRICT COURT

Oct. 14, 1998
Date

ROBERT R. DI TROLIO
Clerk of Court

[illegible]
(By) Deputy Clerk